

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-1948

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH W. HALEY and HENRY WHITNEY,
as Trustees of the International
Association of Bridge, Structural
and Ornamental Iron Workers,
Local 417 Training and Education Fund,

Appellants,

-against-

ROBERT PALATNICK and JOSEPH ALBENDA,
Trustees of the International
Association of Bridge, Structural and
Ornamental Iron Workers, Local 417
Training and Education Fund,

-and-

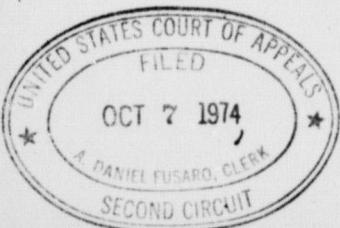
WILLIS C. ROSE, individually,

Appellees.

ON APPEAL FROM THE ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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INDEX

Item	page
Statutes Cited	i.
Introduction	1
Jurisdictional Statement	2
Decision Below	3
Plaintiffs-Appellants' Position	4
Argument	4
Conclusion	13

TABLE OF CITED STATUTES

	page
Labor-Management Relations Act, 29 U. S. C. 186 et seq.	2,5,8
Declaratory Judgment Act, 28 U. S. C. 2201	2
Employee Retirement Income Security Act of 1974	12

i.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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JOSEPH W. HALEY and HENRY WHITNEY, :
as Trustees of the INTERNATIONAL :
ASSOCIATION OF BRIDGE, STRUCTURAL :
AND ORNAMENTAL IRON WORKERS LOCAL :
417, TRAINING AND EDUCATION FUND, :

Plaintiffs-Appellants. :

- against - :

ROBERT PLATNICK, Trustee of the :
INTERNATIONAL ASSOCIATION OF BRIDGE, :
STRUCTURAL AND ORNAMENTAL IRON WORKERS :
LOCAL 417, TRAINING AND EDUCATION FUND :
and JOSEPH ALBENDA and WILLIS C. ROSE, :
former Trustees of the INTERNATIONAL :
ASSOCIATION OF BRIDGE, STRUCTURAL :
AND ORNAMENTAL IRON WORKERS LOCAL 417, :
TRAINING AND EDUCATION FUND, :

and :

WILLIS C. ROSE, Individually, :

Defendants-Respondents. :

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INTRODUCTION

This is an appeal from a dismissal of an action for
a Declaratory Judgement, which action had sought a
declaration of the rights, duties and responsibilities
of the Trustees of an Employer-Union, Joint Trustee,
Training and Education Fund, and more particularly
seeking to have declared void, and restraining the
enforcement of a contract of employment of the former

Union President, Willis C. Rose, one of the Defendants-Respondents herein, as Administrator of such Fund.

The contract of employment was made by Willis C. Rose, while President and Union Trustee and one other Union Trustee and the two Employer-Trustees. The successor Union-Trustees, Plaintiffs-Appellants herein, contend that such contract was consummated through fraud between the Employer-Trustees and former Union Trustees, in breach of their fiduciary responsibilities as Union Officers and Fund Trustees and by reason of the threats and duress of the said Willis C. Rose, as Union President and Trustee.

The extensive decision of the Court below, containing a detailed recitation of the pertinent facts of record and conclusions, permits this Brief to be indeed brief.

FEDERAL JURISDICTION

The Court below concluded that it had subject matter jurisdiction, because Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. Section 186(c)6, grants jurisdiction to Federal Courts to enjoin violations of Section 302, and 28 U.S.C. Sec. 2201 confers upon the

Federal Courts the power to declare rights of parties under this law. (See Appendix to Appellant's Brief, p.55).

THE REASON FOR DISMISSAL

The Court below, assuming jurisdiction, however held that its Federal authority was generally limited to instances of bribery by Employers and extortion by Union representatives, and not to questions of mal-administration of properly established trust funds, including within maladministration, instances of breaches of fiduciary duties by Trustees of such funds. (Appendix, pp. 55-59).

The Court below held that such instances were for State Court review. The Court did hold however that if payments made to Rose by the Fund represented payments made by an Employer to a Union representative, then there was a violation of Section 302 and Federal law and it would not matter whether the payments were direct or indirect (Appendix, p. 60).

PLAINTIFFS-APPELLANTS' POSITION

The Plaintiffs-Appellants respectfully submit that the conclusions of fact and law of the Court below sustain its own predicate that the structure of the fund here was used to make Employer payments to Rose and that therefore, the Court below, itself found, as a fact, the premise stated by it to warrant Federal jurisdiction and relief.

ARGUMENT

Because the opinion below gives so complete an analysis of the facts repetition here would be unwarranted.

The key is found in the opinion of the Court below where Judge McMahon stated:

"The evidence clearly shows a conspiracy by Albenda, Rose, and perhaps others, to divert trust fund monies to Rose, as Fund administrator, an obvious breach of their fiduciary duty to the Fund." (Appendix, p. 66)

From the above, it must be concluded that the Court below found that Union Officials and Trustees, Rose and perhaps others, and Employer-Trustee Albenda conspired to divert trust fund monies to Rose.

"In Arroyo v. United States, 359 U.S. 419 (1959), the Supreme Court noted that a payment ostensibly made to a fund for the lawful purposes set forth in §302 would violate the statute if both parties to the payment knew it was a sham.²³ This is essentially what plaintiffs contend happened here. We think that if the trustees have used the structure of the trust fund to make employer payments to Rose, the statute is violated, whether the payments are direct or indirect.²⁴ The congressional purpose of preventing bribery and extortion in the collective bargaining process will be thwarted if we hold that such payments are legal merely because the employer makes no direct payment to an employee representative. Congress and the Supreme Court did not intend the policy of §302 to be evaded in this manner." (Appendix, p. 60)

The Court below immediately after its holding of a conspiracy to divert fund monies to Rose, sought to deprecate such a finding, because no particular Employer gave any particular money to Rose. Nevertheless the Court again, at page 66 stated:

"Thus, although plaintiffs have shown the defendants sought to divert Fund monies to Rose"

In context it is clear that the Court again found that Employer and Employee Trustees and Union officials diverted Employer fund contributions to Rose in breach of their fiduciary responsibility.

It is respectfully submitted that the Court below, on its own factual conclusions, makes too fine a distinction, and fails to carry out the legislative purpose to police fraud in the operation of Welfare funds - a clearly stated and agreed Federal purpose.

While the Court below so well summarized the evidence in support of the conspiracy to divert Welfare Funds, just a few quotes from the record lend color to the conspiracy, if color be needed.

The Court at the end of the Plaintiffs' case stated:

"The Court: He is a Trustee and he starts working for the outfit that he is a Trustee for. I can't think of a better position of a man hiring himself. The only question is whether he is insulated by truly neutral other arms length transaction or whether it is self-dealing, and I think counsel makes a fair case that it was self-dealing. A Trustee with a beneficiary, without giving the beneficiary a chance at it, at all, suddenly they are confronted with a contract with a Trustee with a sweetheart job -- That is the way it looks to me." (pp. 55-56 of the Transcript of Proceedings, found at rear of the Appendix)

Further, Willis C. Rose, on direct testimony in discussing with Employer Trustee, Joseph Albenda, the internal Union problems involving Mr. Mims' candidacy for election, stated:

"He had stated to me that he felt or had heard rumors that Mr. Mims was going to have problems at election time and if we were short on money in the General Fund, that if one of us became the Administrator, we would still be in the field, could check jobs, and one thing or another, and relieve the General Fund of the expense of the second man, and I explained to Mr. Albenda at that time, I didn't think you could convince Mr. Mims that possibly he should move over and take that job or change in any way from what he was doing, and he even offered to have lunch with him and talk to him. I told him, 'I don't think it will go over.'"
(Transcript, p. 61, at rear of Appendix)

In simple language, Willis C. Rose stated that he discussed with Trustee Albenda how the Union General Fund, being short of money could be helped by putting an Administrator on the Trust Fund payroll and have him "be in the field, check jobs, and one thing and another, and relieve the General Fund of the expenses of the second man,"

Thus, it is absolutely clear that one Employer Trustee and the Defendant Trustee, Willis C. Rose, discussed the use of Trust Fund money for General Fund purposes, i.e., payment by the Employers to the Union, through the conduit of the Training Fund Trust, -- a clear payment of Employer funds to the Union in clear

violation of the direct language prohibiting the payment of money, -- to any labor organization:

29 U.S.C.A. 186(a)(2).

Again to put the matter into true context the Court found, as a fact, that while the Fund would receive about \$25,000 in receipts in 1974, Rose's contract provided him benefits of over \$30,000 per year for five years, in a contract he made with himself as Trustee and intended employee, upon conditions dictated by him.

The Court in its opinion stated:

"In fiscal 1973, the income was \$34,406 and disbursements \$15,199. Gross Fund receipts for the first six months of fiscal 1974 (July 1, 1973 to December 31, 1973) were only \$12,796.68, indicating that total income for 1974 might be as low as \$25,000..... The Rose employment contract provides for payment to Rose of foreman's wages of \$365 per week, expenses of \$100 per week, and for contributions in his behalf to various Union funds of \$123.60, for a total of \$588.60 per week or \$30,607 per year. Thus, the compensation to be paid Rose in the first year of the contract is likely to exceed Fund income for the same period." (Appendix, p. 61)

So too the Fund ran an apprentice school a total of 144 hours a year. Again the Court, in its opinion, stated (Appendix, p. 61):

"Until July 1, 1973, when Rose became administrator of the Fund, it was administered by the JAC teachers of the apprentice school and by Rose, as JAC chairman. Mr. Burchard, the JAC secretary, took attendance, filled out the various forms, and sent them to Rose. Between forty and forty-five students a year attended the school, which operated evenings five hours a week, from mid-September to mid-April, for a total of 144 hours a year."

To put it bluntly the facts clearly indicate a conspiracy by the then incumbent President-Union Trustee, with an Employer-Trustee to take good care of himself, in the event he was beaten for President, all with total disregard of the interest of the beneficiaries of his Trust, the members of his Union. The Court below so found. (Transcript, p. 61, at rear of Appendix)

To borrow from another field of law, evidence of fraud will induce the Court to pierce the corporate veil; the outrageous breach of fiduciary responsibility in this case should have caused the District Court to take similar action and pierce the veil here - the Court should have declared the Fund was being used as a conduit to divert Employer monies to Union officials.

It is respectfully submitted that the Court below had reason enough, on the facts it found itself, to strike against corruption. The instant case is not

one of maladministration, but one of cynical disregard of the meaning of a Trustee's duty to the beneficiaries of his Trust.

Thus there is no doubt that the Employer and Union official conspired to use Welfare Fund money for general fund purposes - i.e. payment of a Union official.

It is respectfully submitted that the Court below broke step with its own syllogism, i.e., major premise, minor premise -- conclusion:

1. It is a Federal offense cognizable in a Federal Court for an Employer to pay money to a Union official or Union Trustee.
2. It does not change the rule if the payment is made through a Welfare Fund.
3. In the instant case, the Court below found payment to the Union official-Union Trustee was made through the Welfare Fund through a conspiracy between the Employer-Trustee representing Employers paying into the Fund and the Fund paying out to the Union official-Trustee.

Yet the Court, despite its own findings, concluded the matter to the contrary by dismissing the complaint.

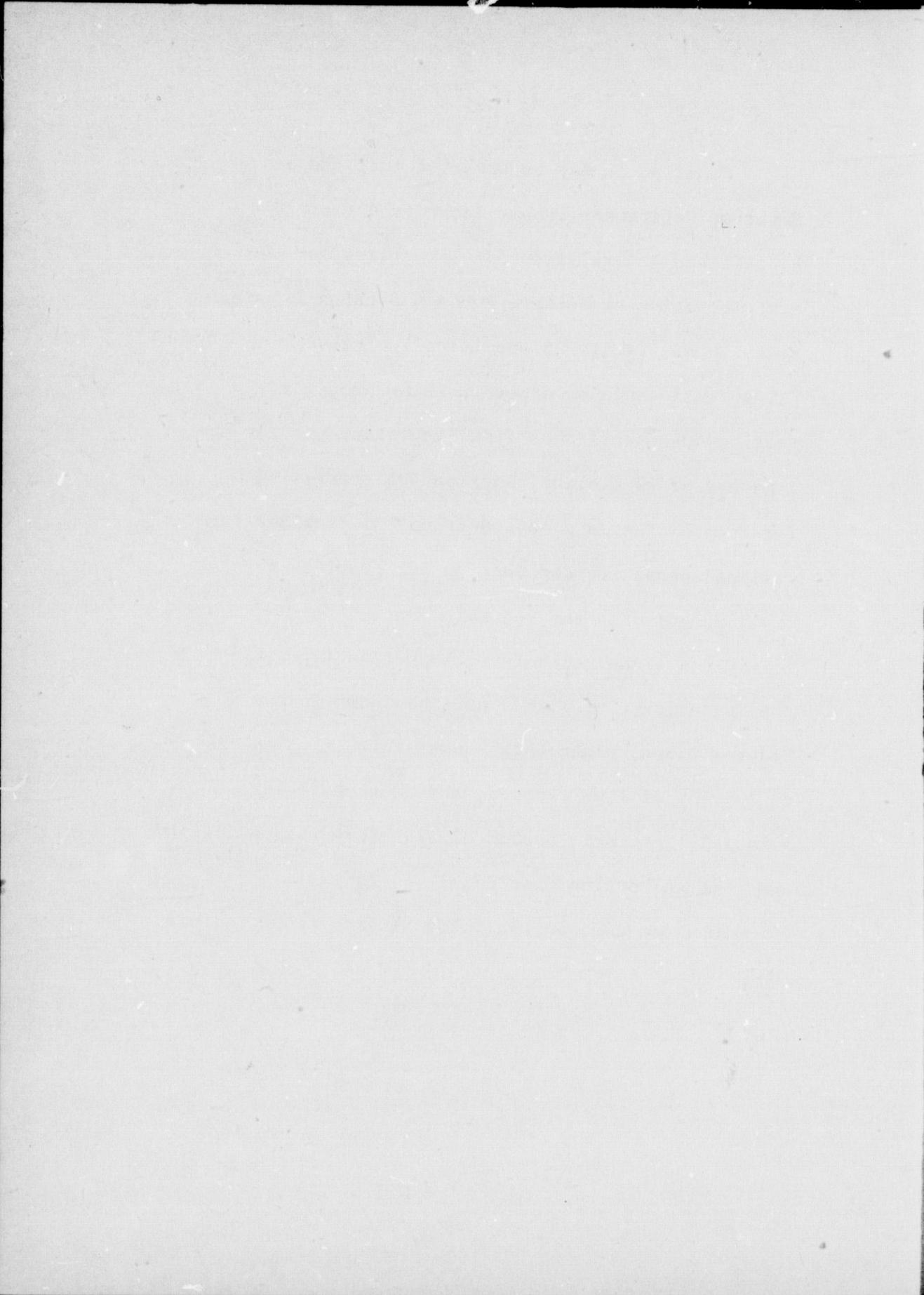
To conclude, it is to be observed that the thoroughly researched opinion of the Court below sustains the conclusion that the weight of authority is to the effect that Federal Courts have not recognized jurisdictionally general claims of maladministration of Trust Funds. There is no reason to argue against the authorities cited on this point by the Court below.

But as was noted at the beginning, the Court below did say the statute is violated when the Fund Trustees use the structure of the Fund to make payments to Rose, whether the payments are direct or indirect. The Court below found such to be the case, i.e. Employer payments into the Fund and a conspiracy to have the Fund create a sweetheart contract with Rose to lessen the burden on the General Fund, which general Union business was performed; a contract in an amount larger than the annual income of the Fund, set up by the President to hire himself, in anticipation of his defeat as Union President.

Finally, it may be observed that the new Employee Retirement Income Security Act of 1974 establishes Federal fiduciary standards for the administration of Welfare Funds. Section 2 includes such Funds; Section 3 specifically includes "...apprenticeship or other training programs.."; Section 404 establishes fiduciary standards for the Trustees of such plans; Section 405 creates liability for breach of such plans; Section 501 provides for criminal penalties and Section 502 provides for Civil remedies in the Federal Courts.

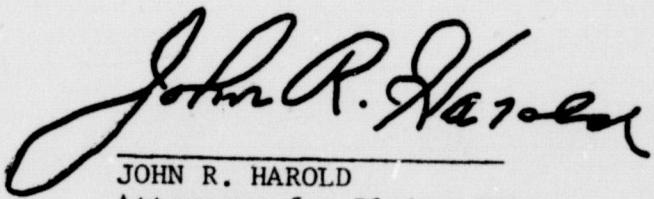
In a sense, therefore, sooner or later, in the State Court or with a new complaint in the Federal Court, under this new statute, this specific conspiracy will be exposed, the Trustees held responsible for their breach of fiduciary responsibility and remedial action decreed.

Why not now, on the facts already found in this case?



CONCLUSION

The determination of the District Court should be reversed, and the relief demanded in the Complaint should be granted.



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Appellants
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOSEPH W. HALEY and HENRY WHITNEY, as
Trustees of the INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL IRON
WORKERS LOCAL 417, TRAINING AND EDUCATION FUND,

Plaintiffs-Appellants,

-against-

ROBERT PALATNIK, Trustee of the
INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON WORKERS
LOCAL 417, TRAINING AND EDUCATION FUND and
JOSEPH ALBENDA and WILLIS C. ROSE, Former
Trustees of the INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL IRON
WORKERS LOCAL 417, TRAINING AND EDUCATION
FUND,

AFFIDAVIT OF
SERVICE

Docket No. 74-1948

-and-

WILLIS C. ROSE, Individually,

Defendants-Appellees.

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State of New York)
)
) ss.:
County of New York)

BENEDICT D. EMANUELE, being duly sworn, deposes and
says:

That deponent is over the age of 18 years, is not
a party to the action and is a resident of New York State;

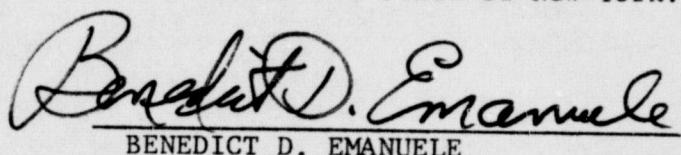
That on the 7th day of October 1974, deponent served
two copies of Appellants' Brief and one copy of the Appendix
to Appellants' Brief upon the Attorneys of all Defendants-
Appellees separately represented in the above-captioned pro-
ceedings, to wit:

GRANIK, GARSON, SILVERMAN & NOWICKI, ESQS.
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GUAZZO, SILAGI & CRANER, P.C., ESQS.
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JOHN M. DONOGHUE, ESQ.
Attorney for Defendant-Appellee Albenda
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Poughkeepsie, New York 12601,

by depositing same enclosed in postpaid properly addressed
wrapper in a Post Office under the exclusive care and custody
of the United States Postal Service within the State of New York.


Benedict D. Manuele
BENEDICT D. EMANUELE

Sworn to before me this
7th day of October, 1974.

Marion L. Slocum

MARION L. SLOCUM
NOTARY PUBLIC, State of New York
No. 31-4505499
Qualified in New York County
Commission Expires March 30, 1975